No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC., a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

BRIEF FOR APPELLEE AMERICAN MAIL LINE, LTD.

Appeal from the United States District Court for the District of Oregon

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
JOHN D. MOSSER, on the brief,
1310 Yeon Building,
Portland 4, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3–58

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Any facts supplementary to those in Appellant's Statement of the Case can be stated in our Argument.

SUMMARY OF ARGUMENT

Appellant, Albina, made a contract with Appellee, American Mail, to make a weight test of the JAVA MAIL's life boats, "cable, davits, etc." This included reporting any defects found, so they could then, on order,

be repaired. Albina did find a serious defect, namely, that the condition of the hook on the after end of the lifeboat, and of its "finger guards" or "keepers" was such as to permit the link at the end of the davit-fall to disengage from the hook and allow the boat to fall into the water, even when the releasing gear, supposed to prevent, along with the "keepers," such disengagement, was locked. Albina did not report such defect, and in failing to do so breached its contract. American Mail did not know of the defect. Shortly after the test was completed, the JAVA MAIL's crew had a boat drill, during which, because of said defect, the boat fell, seriously injuring two crewmen and damaging the lifeboat. American Mail compromised and paid the seamen's claims, after notice to Albina. American Mail is entitled, as damages for said breach of contract, to recover from Albina the amounts paid the two seamen, the damages to the lifeboat and its costs and expenses. Albina does not question the amount, $50,045.01, which has been stipulated (R. 36). This is a simple action at law to recover damages for breach of contract. Tort law is not applicable and for that reason the discussion of the joint tort feasor cases in Appellant's Brief is irrelevant. It is irrelevant for the further reason that the Trial Court held on substantial evidence that plaintiff was not negligent in any respect.

ARGUMENT

The issues are fairly simple. It is admitted there was a contract. The issues are:

What *was* the contract?

Was it breached?

If so, has any conduct of Appellee barred its right to damages?

WHAT WAS THE CONTRACT?

The contract was to make a weight test of the ship's port and starboard lifeboats, their equipment, cable, davits, etc. American Mail and Albina, through their respective representatives, Mr. Toole and Mr. Bailey, orally agreed on this about April first, and the Specifications were written up afterward. Though written up afterward, they embodied the true agreement of the parties, and followed the wording of previous identical Specifications that had been written up between the two men often before and subsequently. The Specification is Item 30 on Exhibit 3 (R. 109), and reads as follows:

> "Annual Inspection continued. Item No. 30.
>
> "Weight Testing—Port and Starboard Lifeboats and *Equipment*. (Emphasis supplied.)
>
> "Furnish weight, 165 pounds per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard Lifeboats, Cable, Davits, etc.
>
> "Note: To be accomplished to satisfaction of U.S.C.G." (R. 109).

These Specifications make it plain in so many words that the equipment, and the cable, davits, etc. were to be weight tested, and since the work was to be done to the satisfaction of the U.S. Coast Guard, it is pertinent to turn to the Coast Guard Regulations themselves, which provide that in lifeboat tests "all other items of life saving equipment shall be examined to determine that they are in suitable condition" (Plaintiff's Exhibit 1, R. 119).

Referring to the fact that these Specifications had been written up in the same form many times before between the same parties, and to the fact that they, in this instance, were written up after the accident, Mr. Bailey of Albina testified that it was customary to write them up in this manner, but that to the best of his recollection (he was not certain) previous Specifications had stopped at the word "lifeboats" and had omitted "cable, davits" etc. (R. 85), but was frank enough to say that "I don't think there is a difference in meaning, particularly" (R. 86). And of course there could not be. If you are going to weight-test a lifeboat, you naturally have to test the hooks, davits, falls and equipment, which are part of it and are going to hold the weight.

It is noteworthy that after the accident Albina sent American Mail a bill for this work, using exactly the same language as the Specifications, thus adopting them without quibble (Exhibit 9-a, R. 50).

The foregoing is merely to give the Court a full recital of how the contract was arrived at, and what the words were.

Appellant does not question all of this. What appellant questions is the interpretation of the contract. Appellant contends that all it had to do was put enough sand in the boat to provide the weight and take it off when the test was finished. Appellant's contention is stated succinctly at Page 12 of its Brief:

> "It seems obvious to the appellant, and the appellant so contends, that weight testing was the function of the U.S.C.G., and that all Albina was to do was to get the sand, put it in the lifeboat, and when the Coast Guard was finished, take it off."

In reply to this we point out:

That contrary to the test being a "function of the U.S.C.G.," the contract was not with the U.S.C.G. at all, but was between American Mail and Albina;

That ~~Albina~~ American Mail paid the bills for it;

That the contract itself refers to testing the "Equipment" and does not stop with "Furnish weight, 165 pounds per person for 66 persons capacity." It continues "And *accomplish weight test* of each the port and starboard lifeboats, cable, davits, etc." (R. 109);

That Mr. Toole testified particularly, without contradiction, that the contract was not merely to satisfy the Coast Guard, but was also to satisfy American Mail, and that if American Mail was not satisfied, they could request Albina to do more (R. 50-51);

That the Coast Guard Inspector, Endreson, testified:

> "Q. And the ship repair yard does what in connection with the test?
>
> A. Well, they have an understanding or contract with the operator or the owners in regard to making repairs as a rule.

Q. Leaving out the repairs, Captain Endresen, and merely on the conduct of the test.

A. Well, no matter what is carried on it is generally between the owners and the contracting party." (R. 97-8).

In conformity with its contention that all it had to do was put the sand in the boat, Albina contends that even though it discovered a defect in the boat and its equipment, it had no duty under its contract to report such defect or do anything about it, no matter how dangerous it might be. This interpretation of the contract is contradicted not only by reason but by Mr. Toole, and by Albina's principal witness, Mr. Bailey. Mr. Toole testified as follows:

"Q. You have, I suppose, had many of these contracts with the shipyards, have you not?

A. Yes, sir.

Q. In your interpretation of the contract and in the practice among shiprepair men was Albina's obligation under the contract, if they found anything wrong with either the finger guards or this hook, to report it to you or do something about it?

Mr. Denecke: Same objection.

The Court: He may answer.

A. Yes, sir. I would expect them to tell me anything they found wrong so we could correct it.

Q. If they reported anything wrong to you, you would give the order to them to correct it; is that right?

A. Yes, sir." (R. 51).

Mr. Bailey testified as follows:

"Q. Mr. Bailey, is it your understanding of the instructions you received from Mr. Toole that Albina was to do anything further about the lifeboat other than provide the weight, to get the weight in and out of the lifeboat, for the weight test?

Mr. Wood: Excuse me, your Honor, I don't see how he can answer that. He says he doesn't remember the conversation that he had with Mr. Toole.

The Court: He may answer if he can.

A. Mr. Wood is right, I don't remember the conversation that I had with Mr. Toole. I might say, however, that anything we felt was unsafe and it came to our attention would ordinarily be reported to Mr. Toole or to somebody with authority." (R. 83).

The foregoing only accords with common sense. The plain meaning of a weight test, is to test something to see whether it will sustain a given weight, in this case the lifeboat and its hook and keepers attaching it to the davit falls. In fact, the hook and keepers are among the most important things to test, because life itself (and this ship carried passengers (R. 107)) may depend on their satisfactory condition to hold the boat with the weight in it under all circumstances. This very accident shows that this hook with its keepers was not in condition to hold the boat with the weight in it under all circumstances. Its condition was such that with the keepers permitting the davit swivel-link to ride on the point of the hook, the hook would not sustain the weight of the boat but let it slip off.

Suppose the hook had a visible crack in it, which plainly impaired the integrity of the hook, and yet, for the time being at least, did not prevent the hook from sustaining the boat's weight. Can it be said that the contractor, employed to make a weight test, should ignore this condition and say nothing about it, dangerous though it might be? Has he fulfilled his contract merely by putting some sand in the boat?

Or suppose one of the cables of the davit falls is "stranded", but nevertheless is strong enough, for the time being, to hold up the weight. Has the contractor fulfilled his contract merely by putting the required weight in the boat? To ask these questions is to answer them.

Some quibbling took place over the word "inspecting". Mr. Toole was asked whether he thought it the duty of the contractor to inspect the lifeboat's equipment. He said "No"; but he explained that by inspecting he meant things like opening up and taking apart some piece of machinery like a pump, and that the contract did not in his interpretation require Albina to inspect in that sense, but that they were bound to report to him any defects which they found so these could be remedied (R. 52-5). The reason for this is plain. The contract did not require Albina to repair anything. Repairs cost money and would not be included in the $240 paid Albina for the weight test. But if Albina discovered a defect requiring repairs or renewals, it was then obligated to report the defect to Mr. Toole so that an agreement could be reached for the making of said repairs or renewals and the cost thereof.

This, both the testimony of Mr. Toole and Mr. Bailey, previously referred to, makes plain.

This interpretation of the contract is the one adopted by the Court in its Finding of Fact 5 (R. 34-5), and as it rested, not merely on the written words, but on the oral testimony of Mr. Toole and Mr. Bailey, and is really not contradicted anywhere, must under the McAllister Rule be sustained.

WAS THE CONTRACT BREACHED?

The breach of the contract cannot be denied. Mr. Stene, Albina's man in the lifeboat, who was making the test, saw that the lifeboat's hook was blunt on the end, and that the keepers were bent or short and spread so as to be ineffectual, and saw that, because of this, the swivel link would slip out from the hook even when the releasing gear was locked, realized that it was dangerous (especially, for he was an experienced man), but reported it to no one, and did nothing about it whatever. He was in a hurry. It is unnecessary to detail his testimony. It will be found on pages 59-66 of the Record.

The Trial Court found that in the foregoing respects defendant breached its contract (Finding 6, R. 35).

That the damages were the result of said breach hardly needs discussion. About half an hour after the test was completed the ship was conducting a boat drill, and because of the aforementioned unreported defects, the swivel link came out of the hook and the boat fell into the water causing damages, the amount of which has been agreed upon. The Trial Court so found in its Findings 8 and 10 (R. 35, 36) and its Conclusions on page 37 of the Record.

HAS ANY CONDUCT OF APPELLEE BARRED ITS RIGHT TO DAMAGES?

Appellant attempts to defeat the claim for damages by arguing that appellee was negligent "(1) In permitting this defect to exist when the plaintiff either knew, or because of the existence of the defect over a period of time, should have known existed. (2) In per-

mitting the two injured persons to enter and remain in the lifeboat without inspecting the falls, which inspection would have readily shown the danger." (Br. 20-21). In short, appellant is urging upon the Court that appellee was a joint tort feasor.

The answer to appellant's argument is twofold:

First, the Trial Court has found on substantial evidence that appellee was *not* negligent in either of the respects claimed.

Second, the joint tort feasor doctrine has no application to this case under recent decisions of the U.S. Supreme Court, as we shall show.

Appellee Was Not Negligent

We shall discuss the factual questions first. The testimony is uncontradicted that the appellee did not know of the pre-existing condition of the hook and keepers (R. 91, 178), "Plaintiff did not know of, and had no reason to suspect the existence of, said defect." (Finding 7, R. 35). This Finding is amply supported by the evidence. After the accident, when an examination was made at Portland, and again at Longview, and an actual trial was had to see whether the link could slip out through the keepers, it was then discovered that that could happen, but it took a trial to determine it (R. 55). It was this that Mr. Toole referred to in his testimony quoted on Page 16 of Appellant's Brief, when he said:

> "Q. Was that condition that you saw there, Mr. Toole, one that was quite open and apparent *when you looked for* it?

A. *When you looked for it,* yes, it was very apparent that it would fall out." (Br. 16) (R. 55-6). (Emphasis supplied.)

And this was recapitulated in counsel's question,

"Q. Am I correct, Mr. Toole, that anybody that looked at this hook, ring and guard would see that the guard was in such a position or the ring was of such size that you could slip it out despite the guard being there?

A. It was apparent that that would occur, yes." (Br. 16) (R. 56).

In short, when the accident motivated a close examination and trial of the equipment to see what could have caused the fall, it was then discovered,—"when you looked for it"—that the keepers were spread.

This, however, is no criterion of the inspection that would normally be made of the boat and its equipment during the prior period when it must have functioned satisfactorily.

In confirmation of this is the evidence that Captain Endresen, the U.S. Coast Guard Inspector, whose especial business it was to examine this equipment, did so before the accident, and his inspection revealed nothing wrong.

"Now, Captain Endresen, did you make an inspection of this lifeboat prior to the accident?

A. I did. I was in the boat during the annual inspection checking the equipment, and so on.

Q. And is an inspection of the hook and the ring a necessary part of your inspection?

A. It goes with the inspection.

Q. Did you make some examination of this ring and hook?

A. I glanced at them and noticed them, yes" . . . (R. 97).

"Q. Now, you said that this hook and the keepers, as you call them, were part of the lifeboat's equipment?

A. Yes.

Q. And you glanced at them?

A. That is right.

Q. Will you tell me where you were and where the boat was when you glanced at them?

A. The boat was in the davits and I was in the boat.

Q. You were in the boat?

A. No. Pardon me, your Honor. The boat was up in the davits secured. That is when I was checking the equipment for the boats.

Q. (By Mr. Wood): You got into the lifeboat?

A. Yes.

Q. While it was suspended from the davits?

A. All the way home, with the gripes on it, secured.

Q. Was that after the test?

A. Before the test.

Q. Before it was taken out of its cradle at all?

A. That is right.

Q. That is when you got in the boat?

A. Yes.

Q. And you looked at the equipment?

A. Yes.

Q. Including this hook and guards?

A. Yes.

Q. You glanced at it?

A. That is right.

Q. And did you observe—

A. I observed. That is all I do, is observe, you know.

Q. Did you observe that the guards were lowered from the point of the hook?

A. No, I didn't. I took them to be okeh then." (R. 102-4).

This examination was on April 5, 1955, two days before the accident (R. 105).

There was thus substantial evidence in support of the Trial Judge's Finding 7 above quoted, that appellant did not know of and had no reason to suspect the existence of the defect (R. 35), and therefore was not negligent (Findings 7 and 9).

As to the second alleged act of negligence, namely, in not inspecting the falls just before the lifeboat drill, the answer is that here again the Trial Court found on substantial evidence that "Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill and was not otherwise negligent in any respect." (Finding 9, R. 36).

This Finding is amply supported by the evidence.

Patterson, the mate, had a right to assume that when Albina's men left the boat they would leave it with the releasing gear locked and proper keepers in place. He had a right to rely on that. In this condition it is impossible for the link to slip out of the hook. Patterson did not know that the keepers were defective. Albina's men did. The raising of the boat from the water up to its cradle on the boat deck and its lowering from the cradle back to the water is purely mechanical. Nothing during that operation touches or disturbs the connection between the link and the hook, and it is impossible at any time during that operation, with the releasing gear locked and proper keepers in place, for the link to come out. No change takes place. Therefore, Patterson, not knowing of the defective keepers, had a right to rely on Albina hooking up the boat properly, and that it was still in safe con-

dition when he ordered it to be lowered. He could not see the connection from his position on the boat deck. The photograph, Exhibit 6, attached to Hinrich's deposition, shows that the hook and link are above his line of vision and obscured by the lifeboat itself. He testified:

> "Q. Now, before you started this lowering of the boat and when the fire and boat drill first began, and you were on the boat deck, did you make any inspection of the link in the hook by which the boat is supported to the falls?
>
> A. No, I did not. I did not inspect it.
>
> Q. Is it customary for the Mate in charge of the lifeboat to inspect the attachment of the link to the hook?
>
> A. It is not customary to inspect.
>
> Q. What do you rely upon?
>
> A. This is a patented device. There could not be anything wrong with these hooks or with anything, if you got the weight on the falls, there is nothing that can happen." (R. 162).

All of the foregoing was substantial evidence on which the Trial Court properly found that the appellee was not negligent in the respect claimed.

Tort Feasor Cases Irrelevant

Even if Appellee had been negligent, which we have shown it was not, this would not preclude recovery.

This is a case in contract in which the doctrines of tort feasors, "active" or "passive," "primary" or "secondary" negligence have no place.

The only thing that could bar Appellee would be conduct on its part which prevented or greatly hindered

Appellant from performing its contract. There is nothing like that in this case. The alleged acts of negligence, urged by Appellant, i.e., failure to inspect, did not in the remotest degree prevent or hinder Appellant in the performance of its contract.

These principles of law were stated in Ryan Stevedoring Co. v. Pan-Atlantic SS Corp., 350 U.S. 124, and even more clearly in Weyerhaeuser SS Co. v. Nacirema Operating Co., Inc., just decided. March 3rd, 1958, by the U.S. Supreme Court and reported in 26 Law Week 4138.

We are sure this Court remembers the facts in the Ryan case. The shipowner sued the stevedore for indemnity on account of damages paid a longshoreman hurt by rolls of paper improperly stowed by the stevedore. The stevedore countered that the shipowner had a duty to oversee the stowage and was at fault. The Court, pointing out that the case was in contract and the tortfeasor cases had no application, held that, regardless of the shipowner's alleged fault, the stevedore, "as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of warranty cannot here excuse that breach" (350 U.S. at pp. 134-5).

So here. Albina was hired to test the lifeboat and its equipment. American Mail's failure to discover and correct Albina's "own breach of contract cannot here excuse that breach."

The Weyerhaeuser case is even more explicit. The suit was by the shipowner for indemnity from the stevedore for damages paid by the shipowner to Connolly, a longshoreman injured by a timber falling from a flimsy shelter, built to protect the winchman from the elements. It had been built by the stevedore while the ship was in New York; was allowed by the ship to remain in place, contrary to custom and due care, during a five days' voyage from New York to Boston, and there again used by the stevedore "in spite of the fact that respondent (the stevedore), as well as petitioner (the shipowner), must have known of its journey from New York, and the possible effect of such a journey on an already flimsy structure. There was evidence that the shelter was not inspected by either party until the injury to Connolly five days after the arrival in Boston."

The Court pointed out that the case was in contract, and was governed by different principles of law from those in the action of Connolly against the shipowner, where the shipowner had been held negligent.

The Court in a footnote referred to Corbin, Contracts, §§571, 947, 1264, as indicating the kind of conduct which, on the part of the shipowner, would preclude recovery. Such conduct is stated by Corbin in §571 to be:

> "If a promisee prevents or greatly hinders the other from rendering a promised performance, he cannot maintain action against that other for breach; the prevention operates as a defense."

Sections 947 and 1264 are to the same effect.

In the present case, American Mail did nothing whatever to hinder or prevent Albina from performing its contract. The alleged acts of negligence, i.e., (1) permitting the defect to exist, and (2) permitting the two injured men to enter the boat without inspecting the falls, obviously did not, and could not, hinder or prevent the performance of the contract in any particular. In fact, the second act occurred after the breach.

The Supreme Court explained:

> "Further, the verdict for Connolly did not *ipso facto* preclude recovery of indemnity by petitioner, for as we have indicated, the duties owing from petitioner to Connolly were not identical with those from petitioner to respondent. While the jury found petitioner 'guilty of some act of negligence,' that ultimate finding might have been predicated, *inter alia,* on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action. 350 U.S., at 134-135." (26 Law Week at p. 4139)

We interpret the foregoing to mean that none of the failures mentioned therein would preclude the shipowner from recovery, but that certainly at least failure to inspect and correct the unsafe condition would not. This should dispose of Appellant's contention that American Mail's failure to inspect the lifeboat hook and keepers precludes it from recovery.

CONCLUSION

Judge McColloch listened to this case carefully, and carefully considered it. Under McAllister, the judgment should be affirmed, and that is what we ask.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
JOHN D. MOSSER, on the brief,
~~Proctors~~ Attorneys for Appellee.